

["Phillips"] automobile crashed into a car driven by appellee Leonard Turbe ["Turbe"], which appellee La Belle Department Store ["LBDS"] owned. Within ten minutes, Officer Bowry of the Virgin Islands Police Department arrived at the scene of the accident at Nazareth Bay Road in St. Thomas, and opened an investigation. An ambulance already was present at the scene. Timothy Phillips' father, Lemuel, was not present.

Timothy Phillips died in the accident. (See Appellee's App. at 38 (Uniform Traffic Accident Report, June 4, 1994).)¹ Officer Bowry interviewed Phillips' passenger, Carmen Hunt ["Hunt"], who stated, "we came around a curve and we [were] traveling east . . . behind another vehicle[,] and . . . our vehicle swerve[d] and went out of control and crash[ed] into something." (See *id.* at 40.) Later, Hunt fully described the collision in a sworn affidavit:

Timothy started to drive fast[,] and as we got near the National Park entrance[,] he increased his speed to pass a car ahead of him. As we began to pass the vehicle, I bent down to put a bag on the floor As I looked up[,] I saw an on-coming vehicle[,] I screamed out[,] "Timothy[,] " and covered my eyes with my hands. As Timothy tried to get back on his side of the road there was an impact. . . . I sustained injuries to my neck and bruise[s] on my legs. None of my injuries were disabling.

¹ The record shows that the parties failed to comply with Virgin Islands Rules of Appellate Procedure 24(b) ("[t]he parties are required to consult and agree on the contents of the appendix") and 11(a) ("[a] single record shall be submitted"). Such noncompliance by the parties in future appeals may be met with monetary sanctions.

(See *id.* at 43.) Hunt averred that "[t]he fact that Timothy was speeding" caused the accident. (See *id.* at 46.)

Officer Bowry also interviewed Leonard Turbe, who had sustained serious injuries. Turbe stated that as he drove east on Nazareth Bay Road, he saw "the driver's side of [Phillips'] vehicle blocking [his] lane[,] and crashed into it before he could apply more pressure to his brakes. (See *id.* at 39.) Bowry then spoke with witnesses David Bogart ["Bogart"] and Gabriel Joseph ["Joseph"]. Bogart recalled that Phillips' automobile "and a silver car [were] racing[,] traveling west from Red Hook, and as they came around [a] curve at a high rate of speed[,] [Phillips' car] was on the right-hand side of the road." He stated that Phillips "saw the oncoming car," and "tried to get back on [the] left side of the road[,] but it was too late," and Phillips' car collided with Turbe's vehicle. Bogart estimated that Phillips was traveling "about sixty-five miles per hour." Joseph agreed with Bogart's description of the accident. (See *id.* at 40.)

After taking these statements, Bowry concluded that Timothy Phillips was completely at fault for the accident because he had attempted to pass a car around a blind curve by speeding and crossing the double-yellow line on the road. Officer Bowry indicated in his report that, had Phillips survived, he would

have cited him for reckless driving, in violation of title 20, section 492 of the *Virgin Islands Code*. Bowry later drew a map of the accident site. (See *id.* at 41-42.)

Nearly two years later, Timothy Phillips' father, Lemuel, brought a wrongful death action *pro se* against Turbe and LBDS in Territorial Court as the administrator of Phillips' estate.² Turbe and LBDS appeared through counsel and filed answers and counterclaims against the plaintiff, Phillips' estate, for personal injuries and property losses caused by the June 4, 1994, collision. (See Appellee's App. at 11, 15 (Defs.' Answers and Counterclaims, *Phillips v. Turbe*, Civ. No. 274/1996 (Terr. Ct. filed Aug. 5, 1996)).) After Phillips' estate responded to the counterclaims, the defendants moved for summary judgment on the plaintiff's wrongful death action. (See *id.* at 28 (Defs.' Mot. for Summ. J., Sept. 27, 1996).) Attached to the defendants' motion was Officer Bowry's report and the sworn statements of Phillips' passenger, Carmen Hunt.

Phillips' estate requested an order granting it until November 25, 1996, to respond to the defendants' motion for summary judgment. On November 20th, the plaintiff obtained

² (See Appellee's App. at 2 (Compl., *Phillips v. Turbe*, Civ. No. 274/1996 (Terr. Ct. filed Apr. 24, 1996)).) Lemuel Phillips and his wife Naomi also appeared as plaintiffs in their personal capacities. The Virgin Islands' wrongful death statute provides, however, that only the decedent's estate may institute such a suit. See V.I. CODE ANN. tit. 5, § 76(d).

subpoenas duces tecum for Ramon Davila ["Davila"], Commissioner of the Virgin Islands Police Department, and Franklin O'Morrow [O'Morrow], an employee at St. Thomas Rescue. These subpoenas commanded Davila and O'Morrow to appear at a certain location on December 2nd with documents, records, and photographs pertaining to Timothy Phillips' fatal accident. (See Subpoenas, *Phillips v. Turbe*, Civ. No. 274/1996 (Terr. Ct. Nov. 20, 1996).) The record does not show, however, that the plaintiff actually served these subpoenas on Davila and O'Morrow.³

On November 25th, the plaintiff asked the Territorial Court to again postpone consideration of the defendants' motion because "neither side has conducted discovery." (See Appellee's App. at 52 (Pl.'s Opp'n, Nov. 25, 1996).) The plaintiff informed the trial court that it was "seeking the police and rescue files, hiring an accident reconstruction expert, [and] hiring an investigator to look for the eyewitnesses," in order to demonstrate that "Mr. Turbe was speeding and lost control of his vehicle," causing Phillips' death. (See *id.* at 56, 60 ("If [this] proposed discovery is uncovered, it would preclude summary judgment.")) Phillips' estate then served document production

³ The record does not contain certificates of service for those subpoenas, and the plaintiff's subsequent requests for production of documents did not refer to them. Indeed, the plaintiff's requests set a date for production different from that stated in the subpoenas. Hence, it appears that Davila and O'Morrow never received subpoenae duces tecum.

requests upon Davila and O'Morrow, requesting that they appear at a certain location, this time on December 20th, with documents, records, and photographs pertaining to the decedent's accident. (See Pl.'s Requests for Prod. of Docs., filed Dec. 30, 1996.) Thereafter, the plaintiff moved to compel Davila and O'Morrow to comply with its document production requests. (See Appellant's App. at 3 (Pl.'s Motions to Compel, Feb. 18, 1997).)

The trial court granted the plaintiff until April 30, 1997, to respond to the defendants' motion for summary judgment. It also granted the plaintiff additional time to retain an attorney, noting that it would deny the plaintiff's motion to compel documents from Davila because he was "not a party to the suit[,] and [could] only be required, under a subpoena together with a tendered witness fee, to appear at a scheduled deposition before a stenographer." (See Appellee's App. at 73-74 (Order, Feb. 19, 1997).) This order warned the plaintiff that, "if no response is filed [by April 30th], the Court will make a decision [based] on the defendants' motion alone." (See *id.* at 74.)

Phillips' estate did not respond to the defendants' summary judgment motion by April 30th, so Turbe and LBDS renewed this motion. (See *id.* at 75 (Defs.' Renewed Mot. for Summ. J., May 6, 1997).) The plaintiff then responded by referring to its previous request for additional time. Finally, on May 16th, the

Territorial Court granted summary judgment to the defendants on the plaintiff's wrongful death claim, concluding that "no genuine issue of material fact exists to substantiate that Timothy Phillips' death was caused as a result of any wrongful act . . . by [the] defendants." (See *id.* at 86 (Order, May 16, 1997).)⁴

The plaintiff subsequently filed two motions to reconsider. The first, filed *pro se*, asked the trial court to vacate its summary judgment order based on the affidavits of Lemuel Phillips as well as Charlene Jones ["Jones"], a nurse who attended to Timothy Phillips on June 4, 1994. (See Appellant's App. at 13-14 (Pl.'s Mot. to Recons., June 5, 1997).) Lemuel Phillips based his affidavit not on his own perceptions, but those of several alleged eyewitnesses not interviewed by Officer Bowry who claimed that Turbe had been racing with Bogart when the crash occurred. (See *id.* at 16-17.) Jones' affidavit recalled from personal knowledge that Timothy Phillips "had an open bottle between his legs that looked like a wine cooler bottle" after the collision. (See Appellant's App. at 18.) The Territorial Court denied the plaintiff's initial motion for reconsideration. (See *id.* at 27 (Order, June 20, 1997) (stating that "[p]laintiff ha[d] offered

⁴_____The trial court's memorandum opinion incorrectly identified the date of the accident as June 14, 1994. Officer Bowry's report and Carmen Hunt's affidavit both state that the crash occurred on June 4, 1994. (See Appellees' App. at 38, 43.)

no concrete evidence to refute the findings on which the decision was based").) After Phillips retained attorney Wayne L. Sprauve, the plaintiff repeated these contentions through counsel in a second motion for reconsideration, which the trial court also denied. (See *id.* at 28-31 (Pl.'s Mot. to Recons., July 3, 1997); Order, July 9, 1997.)⁵ Phillips' estate filed a timely appeal. (See *id.* at 1 (Notice of Appeal, July 12, 1997).)

DISCUSSION

The Appellate Division has jurisdiction here under 4 V.I.C. § 33, and will affirm the summary judgment entered below.

Our review of the trial court's judgment of law is plenary. See *Thomas v. Abamar-BB*, 35 V.I. 117, 120, 934 F. Supp. 164, 166 (D.V.I. App. Div. 1996). Summary judgment is appropriate when "the pleadings . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Once the moving party properly supports its motion for summary judgment, the non-moving party cannot rest on its pleadings, but must advance competent evidence to establish a genuine dispute about the material facts. See

⁵ This Court later disbarred Attorney Sprauve for misconduct unrelated to this case. See *Sprauve v. Mastromonico*, Civ. No. 1999-002, 1999 WL 641429 (D.V.I. filed Aug. 12, 1999). Phillips' estate did not retain new counsel, and appears *pro se* on appeal.

Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). When deciding whether the moving party has carried its ultimate burden of persuasion, the Court must regard the non-moving party's competent evidence as true and resolve any doubt in that party's favor. See *Zurita v. Virgin Islands Daily News*, 20 V.I. 488, 492, 578 F. Supp. 306, 308 (D.V.I. 1984).

Virgin Islands law provides that the estate of any decedent may institute a wrongful death action against persons who caused the decedent's death through "wrongful act[s], negligence, default, or breach of contract or warranty . . . [that] would have entitled the person injured to maintain an action and recover damages if death had not ensued." See 5 V.I.C. § 76(c).

Neither the police report generated by Officer Bowry nor the eyewitness affidavits of Carmen Hunt, David Bogart, Gabriel Joseph, or Charlene Jones contain any fact that suggests that Turbe committed any negligent or wrongful act leading to Phillips' death. Phillips' estate conceded this point when it asked the trial court for additional time for discovery under Federal Rule of Civil Procedure 56(f).⁶

Phillips' estate has adduced no competent evidence to show

⁶ (See Appellee's Br. at 57 ("[p]laintiff is attempting to get statements supporting his assertions"), 60 ("If plaintiff's proposed discovery is uncovered, it would preclude summary judgment.") (Pl.'s Opp'n, Nov. 25, 1996).)

that Turbe caused the decedent's death. Lemuel Phillips' subsequent sworn statement, which claims that eyewitnesses reported that Turbe was "racing with [Bogart's] vehicle" when the accident occurred, cannot establish a genuine dispute of fact because it is rank hearsay. See FED. R. CIV. P. 56(e) ("opposing affidavits shall be made on personal knowledge [and] shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein"). Viewing the defendants' exhibits in the light most favorable to the plaintiff, we would concur with the trial court that there was no material issue for trial. The plaintiff adduced no evidence to show that Turbe was negligent. Indeed, the police report, the personal statements of the undisputed eyewitnesses, and most importantly, Carmen Hunt's sworn affidavit all suggest that the decedent's own conduct led to his demise. This complete failure of proof concerning an essential element of the plaintiff's wrongful death claim warranted summary judgment for the defendants. See *Celotex Corp.*, 477 U.S. at 322-23.

The plaintiff argues that it would have been able to demonstrate a genuine issue of material fact if the trial court had granted its motions to compel Davila and O'Morrow to produce records, documents, and photographs concerning Phillips' car

accident. The scope of discovery lies within the sound discretion of the trial court, so we review the trial court's denial of the plaintiff's motion to compel for an abuse of discretion "resulting in fundamental unfairness in the trial of the case." See *Hickman v. Taylor*, 329 U.S. 495, 512 (1947); see also *Marroquin-Manriquez v. INS*, 699 F.2d 129, 134 (3d Cir. 1983).

The trial court did not abuse its discretion by denying the plaintiff's motions to compel, which sought to compel documents from non-parties without complying with the Federal Rules of Civil Procedure. See TERR. CT. R. 39(a) (declaring that Federal Rules govern discovery in Civil Division of Territorial Court). The record does not show that Phillips' estate attempted to confer with the defendants before commencing discovery, served Davila or O'Morrow with subpoenae duces tecum and witness fees in conjunction with its document requests, or attempted in good faith to confer with Davila and O'Morrow before moving to compel their cooperation. See FED. R. CIV. P. 26(d) & 34(b) (mandating that parties confer with each other before discovery), 34(c) & 45(b)(1) (requiring appropriate subpoenas and fees for discovery of documents from non-parties), 37(a)(2)(B) (noting prerequisites for motions to compel discovery). Sophisticated *pro se* litigants such as the plaintiff, who cited the correct rule of procedure in

its motions to compel, should make reasonable efforts to comply with the rules of discovery. These rules exist solely to ensure fair and orderly adjudications, and the plaintiff should have complied with them before seeking judicial enforcement. The plaintiff's motion to compel was improper.

Aware that the representative of Phillips' estate was proceeding *pro se*, the trial judge strove to clarify the Federal Rules' requirements for discovery by suggesting that the plaintiff schedule a deposition and serve Davila and O'Morrow with "subpoena[s] together with . . . witness fee[s]." (See Appellee's App. at 73-74 (Order, Feb. 19, 1997).) Rather than following the court's suggestion, complying with the Federal Rules, and renewing its discovery requests, the plaintiff responded to this order by entirely abandoning its inquiry. Phillips' estate did not move for reconsideration of its motion to compel--it sat and waited for Davila and O'Morrow to forward documents that they were not yet obliged to produce. As the trial court noted, such dilatory behavior by the plaintiff, nearly three years after the accident took place, might well be grounds for dismissal for lack of prosecution. (See *id.* at 86 (Order, May 16, 1997).)

Having afforded the plaintiff nearly six months to marshal facts in support of its case, the trial court did not abuse its

discretion in denying the plaintiff's motion to compel. See *Estephane v. Hobson*, 18 V.I. 396 (D.V.I. 1981) (warning plaintiffs that court would enter summary judgment against them unless they presented facts to support their allegations within sixty days, since "there has been a good amount of time already to initiate discovery"). We affirm.

DATED this 28th day of January, 2000.

ATTEST:
ORINN ARNOLD
Clerk of the Court

By: _____/s/_____
Deputy Clerk

NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
APPELLATE DIVISION

LEMUEL L. PHILLIPS, JR., as
Personal Representative of the
Estate of Timothy Phillips, LEMUEL
L. PHILLIPS, JR., individually and
as survivor of Timothy Phillips,
and NAOMI PHILLIPS,

Appellants,

V.

LEONARD TURBE and LA BELLE DEP'T
STORE, INC.,

Appellees.

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) **D.C. Civ. App. No. 1997-175**
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) Re: Terr. Ct. Civ. No. 274/1996
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On Appeal from the Territorial Court of the Virgin Islands

Considered October 13, 1999
Filed January 28, 2000

BEFORE : **RAYMOND L. FINCH**, Chief Judge, District Court of the Virgin Islands; **THOMAS K. MOORE**, Judge of the District Court of the Virgin Islands; and **MARIA M. CABRET**, Presiding Judge, Territorial Court of the Virgin Islands, Division of St. Croix, Sitting by Designation.

ATTORNEY:

David A. Bornn, Esq.
St. Thomas, U.S.V.I.
Attorney for Appellees.

ORDER OF THE COURT

AND NOW, this 28th day of January, 2000, having considered the parties' submissions, and for the reasons set

forth in the Court's accompanying Opinion of even date, it is
hereby

ORDERED that the summary judgment entered by the Territorial
Court against the appellants on May 16, 1997, is **AFFIRMED**.

ATTEST:

ORINN ARNOLD
Clerk of the Court

By: _____/s/_____
Deputy Clerk

Copies to:

Judges of the Appellate Panel
Honorable Geoffrey W. Barnard
Honorable Jeffrey L. Resnick
Judges of the Territorial
Court

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NOT FOR PUBLICATION